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ABSTRACT

This paper discusses how outdoor recreation and education personnel can work with the laws, regulations, patterns, and vagaries of educational and institutional permitting on public lands in the United States. The difference between a permit and a management plan is defined: a permit authorizes a specific activity with restrictions of amount, duration, and other conditions; a management plan relates to group size and recognition of need. The interrelationships among legislation, interpretation, regulation, and agency discretion and at what point each can be challenged are outlined. The terms "commercial use," "outfitting," "guiding," and "educational use" are defined by Forest Service and Bureau of Land Management regulations. Considerations and recommendations for obtaining and maintaining permits include: knowing the agency's management plan; knowing the area, its problems and recreational use pressures; utilizing personal contacts; working with adverse local parties; requesting reconsideration of permit denial; and getting involved in the management planning process for the areas where the group wishes to operate. (SAS)

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Permits to Operate:
Doing What We Do With The Proper Authority — USA Context

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ABSTRACT: Synopsis and discussion of the terms, patterns, and vagaries of educational and institutional permitting in the United States. How do agencies define our operations for the purposes of permitting our use of public land? We are non-profit, yet commercial operators. Few to none of our activities qualify as common adventures. We must learn to deal with regulation, law and authority. Should we seek institutional exemptions or categorization? Do we need priority use days, fees or fee waivers? How do we cope with permit applications, agency evaluations of our programs, the cost, the paperwork, the meetings, and still budget and administer courses and programs?

ED 419 642

Prologue

The future of use for public land is more permits, not fewer, greater accountability to and regulation by land managers, not less. Outdoor educators and recreationists are being called on to deal with bureaucracy and paperwork.

It is time for outdoor recreation and education to come to grips with permits. We need to respect the tools that land managers use to protect and preserve or resources -- permitting is such a tool. How can we work with permitters? Can we, should we establish our own categories and types of regulatory authority? Have we already, knowingly or unwittingly, established such categories? How can we make institutional or semi-public permitting work?

This is a paraphrase of my presentation as the coordinator of a panel regarding permitting in the domestic context. Most of the text is ripped right out of a report prepared by Chad Henderson, my predecessor at NOLS. As was evident to those who attended ICORE's two sessions on permitting, there is much to discuss, much that could apply to any context, domestic or international, and much that remains unanswered.

RC 021505

Terms of Endearment

First, it is important to understand what a permit is and what it is not. A permit authorizes a specific activity of a specified amount and duration. It places conditions on the permittee and the permittee's activities, all of which must be met or the permit may be revoked.

A permit is not a management plan. For example, problems related to group size and agency recognition of the need for your activity are properly directed at the land management planning process, not the permitting process. Knowing where to target your efforts given a certain problem is the first step toward effective troubleshooting.

Regulatory Context

Congress passes laws, the executive branch interprets these laws and writes regulations, and agencies implement the regulations. For example, the National Park Service has two manuals that affect concession and commercial use, NPS-48 ("The Concessions Guideline") and NPS-53 ("Special Park Use Guidelines"). NPS-48, alone, is 900 pages long and is frequently revised without public notice or comment (since the manual is not a regulation, the agency insists that revisions are not required to be published in the Federal Register). It is important to remember that the only "layers" of this regulatory wall that have the force of law are the statutes and regulations. If an agency's policy as articulated in a manual does not sit well, check the regulations and statutes upon which it is based. Sometimes an agency can misinterpret Congressional intent and the purpose of a statute.

Thus, a statute can be challenged if it is unconstitutional. A regulation can be challenged if it fails to accurately represent the intent of the statute on which it is based. An agency policy can be challenged if it fails to accurately represent the law.

Discretionary Context & Standards of Review.

Probably the most frustrating hurdle is agency discretion. Each agency provides broad discretion to its managers to decide whether or not commercial activities will be allowed.
Coupled with that broad discretion is the courts' reluctance to overturn agency decisions. Judicial review of agency decisions is rarely successful. Probably something on the order of 99 out of every 100 agency decisions subjected to judicial review are upheld by the courts. Thus, it is critical to win at the administrative review level.

Common Terms: "Commercial Use"

Forest Service

"Commercial use or activity" -- any use or activity on National Forest System lands (a) where an entry or participation fee is charged, or (b) where the primary purpose is the sale of a good or service, and in either case, regardless of whether the use of activity is intended to produce a profit (FS 36 CFR 251.51.).

Related Forest Service definitions

"Outfitting." Providing through rental or livery any saddle or pack animal, vehicle or boat, tents or camp gear, or similar supplies or equipment, for pecuniary remuneration or other gain. The term "outfitter" includes the holder's employees, agents, and instructors.

"Guiding." Providing services or assistance (such as supervision, protection, education, training, packing, touring, subsistence, interpretation, or other assistance to individuals or groups pecuniary remuneration or other gain. The tern "guide" includes the holder's employees, agents, and instructors (FS Manual Chapter 40 sect. 41.53 (c)).

Bureau of Land Management

"Commercial use" is recreational use of the public lands for business or financial gain. When any permittee, employee or agent of a permittee, operator, or participant makes or attempts to make a profit, salary, increase his business or financial standing, or supports, in any part, other programs or activities from amounts received from or for services rendered to customers or participants in the permitted activity, as a result of having the special recreation permit, the use will be considered commercial. Subsistence activities of Alaskan Natives (as defined in the Alaska Native Claims Settlement Act) in Alaska are not considered recreational use. The collection by a permittee or his agent of any fee, charge, or other compensation which is not strictly a sharing of, or is in excess of, actual expenses incurred for the purposes of the activity or use shall make the activity or use commercial. Use by educational and therapeutic institutions is considered commercial when the above criteria are met. Profit making organizations are automatically classified as commercial, even if that part of their activity covered by the permit is not profit making. Nonprofit status of any group or organization under the Internal Revenue or Postal Laws or regulations does not in itself determine whether an event or activity arranged by such a group or organization is noncommercial. Any person, group, or organization seeking to quality as noncommercial shall have the burden of establishing to the satisfaction of the authorized officer that no financial or business gain will be derived form the proposed use (43 CFR sect 8372.0-5 (a)).

"Educational use"

Forest Service

Permits may be issued to institutional and semi-public outfitting and guiding applicants consistent with forest land and resource management plan direction for commercial use and group size. Schedules and services may fluctuate from season to season or year to year. Applicants may include a variety of membership or limited-constituency institutions, such as religious, conservation, youth, fraternal, service club, and social groups; educational institutions, such as schools, colleges and universities; and similar common interest organizations and associations. This category may also include applicants who operate commercially on a limited or intermittent basis in providing service to selected customer clientele rather than to the public at large. Outfitting and guiding activities conducted by institutional or semi-public may be authorized regardless of whether a fee or other consideration is collected from participants (FS Manual Chapter 40 41.531).

Related Forest Service definition

"Noncommercial use or activity" is any use or activity that does no involve a commercial use or activity as defined in this section (FS 36 CFR 251.51).

Bureau of Land Management

"Educational use" is an academic activity sponsored by an accredited institution of learning (43 CFR sect. 8372.0-5(e)).

Considerations & Recommendations

Obtaining New Permits

- Read the park/forest/resource are plan carefully; focus your application on use, goals, and objectives that are listed in the management plan.
- Indicate that you know the area, its history, problems, recreational use pressures; your program will fit into the current context and assist the agency in meeting its challenges; be specific.
- Utilize personal contacts, to the extent possible. Build a relationship with the agents responsible for managing the area, regional, system.
- Meet and greet potentially adverse local parties.

Maintaining Permits

- Personal approach is critical. Make rounds of your permit areas on a regular basis. Discuss your program, ask how you can assist the local managers, i.e. trail maintenance, use records, training opportunities.

- Be aware of any outfitter evaluation process. Make sure your instructors/guides know what the evaluation criteria are so that they won't be caught off guard when a ranger steps into camp.

- Educate your instructors and guides about the area, specifically the local and idiosyncratic rules.

Permit Denial

- Request reconsideration and, if possible, meet personally with the local decision-maker.

Management Plan

- Get and remain involved in the management planning process for the areas where you wish to operate.

Institutional Permitting

Look to AORE to help determine the efficacy of categorization, definition, and, ultimately, permitting as an institutional operator.

About the Author, Moderator, and Panelists:

Stefan J. Jackson is the Public Policy Manager for the National Outdoor Leadership School (NOLS). A lawyer and outdoor professional by training, he oversees the management of over 50 special use, commercial use, and concessionaire authorities. Be they permits, licenses, contracts, letters of agreement or memoranda of understanding, Stefan works with them all and with the staff at all NOLS branches (four domestic and four international) who submit the bulk of the permit paperwork. NOLS is a 501(c)(3), non-profit, educational organization, and a fully-permitted commercial outfitter, that has maintained its portfolio of permits and built relationships with permitting authorities -- regulatory agencies, private land-owners, and legislators -- for over thirty years.

The panelist include: Craig Mackey is the Public Policy Liaison for Outward Bound USA; Myrna Johnson is the Government Affairs Director for ORCA; Lenore Andersen is the Environmental Resources Director for Colorado Outward Bound.